

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

MAR - 6 2008

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Petition of Intrado Communications of Virginia Inc.)
Pursuant to Section 252(e)(5) of the Communications)
Act for Preemption of the Jurisdiction of the Virginia)
State Corporation Commission Regarding Arbitration)
of an Interconnection Agreement with Central Telephone)
Company of Virginia and United Telephone - Southeast,)
Inc. (collectively, "Embarq"))
)

WC Docket No. _____

PETITION OF INTRADO COMMUNICATIONS OF VIRGINIA INC.

Intrado Communications of Virginia Inc. ("Intrado Comm"), by its attorneys, hereby respectfully requests that the Federal Communications Commission ("Commission") preempt the jurisdiction of the Virginia State Corporation Commission ("VSCC") in order to arbitrate the pending interconnection issues between Intrado Comm and Central Telephone Company of Virginia and United Telephone - Southeast, Inc. (collectively, "Embarq"). This petition arises from the VSCC's decision to defer Intrado Comm's request for arbitration against Embarq to this Commission.^{1/} In light of that deferral, Intrado Comm requests that the Commission expeditiously assume jurisdiction over and arbitrate Intrado Comm's interconnection agreement with Embarq pursuant to the Commission's authority under Section 252(e)(5) of the Communications Act of 1934, as amended ("Act")^{2/} and Section 51.803 of the Commission's rules and regulations.^{3/}

^{1/} Case No. PUC-2007-00112, *Petition of Intrado Communications of Virginia Inc. for Arbitration to Establish an Interconnection Agreement with Central Telephone Company of Virginia d/b/a Embarq and United Telephone - Southeast, Inc. d/b/a Embarq, under Section 252(b) of the Telecommunications Act of 1996*, Order of Dismissal (Feb. 14, 2008) ("Virginia Order") (Attachment 2).

^{2/} 47 U.S.C. § 252(e)(5).

^{3/} 47 C.F.R. § 51.803.

BACKGROUND

Intrado Comm is authorized to provide competitive local exchange services in the Commonwealth of Virginia.^{4/} In addition to other local exchange service, Intrado Comm seeks to offer public safety answering points ("PSAPs") and other public safety agencies a competitive alternative to the incumbent 911 network and services. Intrado Comm's next-generation 911 service offering provides aggregation, routing, transmission, and transport of traditional and non-traditional emergency call traffic to the appropriate PSAP. Similar to any other competitive local exchange carrier, Intrado Comm must interconnect its network with incumbent local exchange carriers ("ILECs") that have connections with and provide services to PSAPs and other end users.

To achieve the interconnection and interoperability between carrier networks needed for the provision of 911 services, Intrado Comm requested interconnection from Embarq in May 2007.^{5/} Embarq proposed using its template interconnection agreement to start the Parties' interconnection negotiations. After an initial meet-and-greet conference call, Intrado Comm provided Embarq with an initial mark-up of the template agreement in September 2007 and additional revisions in October 2007.

In early November 2007, Intrado Comm received correspondence from Embarq setting forth Embarq's position that portions of Intrado Comm's interconnection request may be governed by Section 251(a) of the Act, but that Intrado Comm's interconnection request did not fall under Section 251(c)(2). Shortly thereafter, the Parties held another conference call during which Embarq re-stated its position that it does not believe Intrado Comm is entitled to Section

^{4/} Case No. PUC010212, *Application of Intrado Communications of Virginia Inc. for Certificates of Public Convenience and Necessity to Provide Local Exchange and Interexchange Telecommunications Services*, Final Order (Mar. 20, 2002) (granting Intrado Certificate of Public Convenience and Necessity No. T-578).

^{5/} Affidavit of Thomas Hicks, Director-Carrier Relations (attached as Attachment 1).

251(c) interconnection because the services provided by Intrado Comm are not telephone exchange or exchange access services. Embarq also indicated that Intrado Comm is not entitled to 251(c) interconnection because Intrado does not serve retail end users.

Given the apparent unwillingness of Embarq to negotiate an interconnection agreement with Intrado Comm, Intrado Comm filed a Petition for Arbitration with the VSCC on November 27, 2007.^{6/} Intrado Comm's Petition for Arbitration designated as an issue for arbitration whether Intrado Comm is entitled to Section 251(c) interconnection and Section 252 arbitration along with all other substantive issues raised by the Embarq template interconnection agreement, which had been further revised by Intrado Comm prior to filing for arbitration.^{7/}

The VSCC issued a decision on February 14, 2008. In the *Virginia Order*, the VSCC deferred the issue of whether Intrado Comm is entitled to Section 251(c) interconnection (as well as all other issues designated for arbitration by Intrado Comm) to this Commission. Specifically, the VSCC stated:

In this case, we find there is a threshold issue that should be determined by the Federal Communications Commission ("FCC"). Therefore, we believe the FCC is the more appropriate agency to determine whether Intrado is entitled to interconnection pursuant to § 251(c) of the Telecommunications Act. As a result, based upon the potential conflict that may arise should the Commission attempt to determine the rights and responsibilities of the parties under state law or through application of the federal standards embodied in the Telecommunications Act, we find that this arbitration proceeding should be deferred to the FCC. . . . We note that until such time as this threshold issue is resolved that it would

^{6/} For purposes of the statutory deadlines, there is agreement among the Parties that interconnection negotiations commenced on June 22, 2007, resulting in the state commission arbitration window opening on November 3, 2007 and closing on November 28, 2007. Intrado Comm also filed petitions for arbitration against Embarq entities in Ohio and Florida.

^{7/} On December 21, 2007, Embarq filed its Response to Intrado Comm's Petition for Arbitration as well as a Motion to Dismiss Intrado Comm's Petition for Arbitration. Intrado Comm filed an Opposition to Embarq's Motion to Dismiss on January 14, 2008, and Embarq filed a reply on January 23, 2008.

be inappropriate to resolve the other disputed issues. Therefore we will defer resolution of all issues in Intrado's Petition to the FCC.^{8/}

The VSCC has determined that it is not the appropriate agency to resolve the issues presented by Intrado Comm for arbitration, thus requiring Intrado Comm to file this Petition to enforce its rights under the Act.^{9/}

ARGUMENT

The Commission should exercise its authority under Section 252(e)(5) of the Act to preempt the authority of the VSCC over Intrado Comm's arbitration request.^{10/} Under Section 252(e)(5), the Commission is required to preempt the jurisdiction of a state commission in any Section 252 proceeding or matter in which the state commission "fails to act to carry out its responsibility" under Section 252.^{11/} The Commission has expressly acknowledged its authority to preempt a state commission's jurisdiction,^{12/} and the prerequisites for Commission preemption have been met.

First, Intrado Comm's arbitration request was filed pursuant to Section 252(b), which gives Intrado Comm the right to file for arbitration from the 135th to the 160th day after Embarq received Intrado Comm's negotiation request.^{13/} As the *Virginia Order* acknowledges, Intrado Comm's petition for arbitration was filed pursuant to Section 252(b).^{14/}

^{8/} *Virginia Order* at 2-3, n.2.

^{9/} While Intrado Comm and Embarq have continued their negotiations pursuant to arbitration procedures established in other states, several issues remain outstanding and it is unclear whether Embarq views those negotiations (and the resulting resolved issues) as applicable to the Parties' Virginia interconnection agreement.

^{10/} 47 U.S.C. § 252(e)(5).

^{11/} 47 U.S.C. § 252(e)(5).

^{12/} See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 1285 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

^{13/} 47 U.S.C. § 252(b)(1); see *supra* note 6 (stating the relevant arbitration window for Intrado Comm's request).

^{14/} *Virginia Order* at 1 (noting that Intrado Comm "filed a Petition for Arbitration ("Petition") with the State Corporation Commission ("Commission") pursuant to 47 U.S.C. § 252(b)(1)").

Second, the VSCC has “responsibility” under Section 252 to arbitrate and resolve any open issues in connection with interconnection negotiations once requested to do so.^{15/} The VSCC itself acknowledges that it is required to “discharge the responsibilities of state commissions pursuant to the Telecommunications Act,” which includes “the arbitration of interconnection agreements.”^{16/} There is no question that resolution of Intrado Comm’s arbitration request is within the VSCC’s “responsibility” under the Act.

Third, the VSCC failed to “act to carry out its responsibility” under Section 252 when it refused to arbitrate the disputed issues between Intrado Comm and Embarq in accordance with the mandates set forth in Sections 251 and 252.^{17/} Instead, the VSCC explicitly deferred the outstanding issues to this Commission for resolution. The VSCC’s determination to defer action in a proceeding within its statutory authority is equivalent to a “failure to act” for purposes of Section 252(e)(5).

Fourth, the Commission has exercised its preemption authority based on similar actions by the VSCC on numerous other occasions.^{18/} Only when a state agency “actually makes a determination” under Section 252 can the Commission deny a request for preemption.^{19/} The VSCC’s outright dismissal “for the express purpose of enabling the parties to proceed before this

^{15/} 47 U.S.C. § 252(b)(1); *see also* *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (finding that Section 252 of the Act entrusts state commissions jurisdiction over interconnection agreements); *Global Naps, Inc. v. FCC*, 291 F.3d 832, 838 (D.C. Cir. 2002) (noting that it is “the state agency’s responsibility to make a determination – that is, to mediate, to arbitrate, to approve, and (possibly) to interpret and enforce an interconnection agreement”).

^{16/} *Virginia Order* at 2.

^{17/} 47 U.S.C. § 252(e)(6).

^{18/} *See, e.g.,* *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277 (2000); *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 FCC Rcd 6224 (2001); *Petition of Cavalier Telephone, LLC Pursuant to Section 252(e)(5) of the Telecommunications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, 18 FCC Rcd 1558 (2003) (“*Cavalier Preemption Order*”).

Commission” indicates that the VSCC “failed to carry out its section 252 responsibilities” with respect to Intrado Comm’s petition for arbitration.^{20/} Accordingly, preemption is appropriate under Section 252(e)(5).

^{19/} *Global NAPs, Inc. v. FCC*, 291 F.3d 832, 836 (D.C. Cir. 2002).

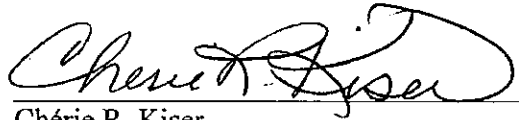
^{20/} *Cavalier Preemption Order* ¶ 6; *Petition of KMC Telecom of Virginia, Inc., KMC Telecom V of Virginia, Inc., and KMC Data LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Sprint*, 20 FCC Rcd 7542, ¶ 5 (2005).

CONCLUSION

For the foregoing reasons, Intrado Comm respectfully requests that the Commission preempt the jurisdiction of the Virginia State Corporation Commission and arbitrate the remaining interconnection disputes between Intrado Comm and Embarq.

Respectfully submitted,

**INTRADO COMMUNICATIONS OF
VIRGINIA INC.**



Cherie R. Kiser
Angela F. Collins
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
202-434-7300 (telephone)
202-434-7400 (facsimile)
crkiser@mintz.com
afc Collins@mintz.com

Craig W. Donaldson
Senior Vice President - Regulatory Affairs

Rebecca E. Ballesteros
Associate Counsel

Thomas Hicks
Director - Carrier Relations

Intrado Communications of Virginia Inc.
1601 Dry Creek Drive
Longmont, CO 80503
720-494-5800 (telephone)
720-494-6600 (facsimile)

Its Attorneys

Dated: March 6, 2008

CERTIFICATE OF SERVICE

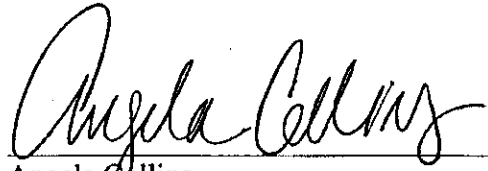
I, Angela Collins, hereby certify that on this 6th day of March, 2008, I served true and correct copies of the foregoing Petition of Intrado Communications of Virginia Inc. on the following via the method indicated:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Via Hand Delivery

Joel Peck
Clerk
Virginia State Corporation Commission
1300 East Main Street
Richmond, VA 23219
Re: CASE No. PUC-2007-00112
Via Federal Express

Edward Phillips
Attorney for Embarq
1411 Capital Boulevard
Wake Forest, NC 27587-5900
Via Federal Express and Electronic Mail

William Watkins, Esq.
Attorney for Embarq
5454 West 110th Street
Overland Park, KS 66211
Mailstop: KSOPKJ0401
Via Federal Express and Electronic Mail


Angela Collins

Attachment 1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Petition of Intrado Communications of Virginia Inc.)
Pursuant to Section 252(e)(5) of the Communications)
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AFFIDAVIT OF THOMAS HICKS

I, Thomas Hicks, state as follows:

1. I am employed by Intrado Inc. as Director - Government Affairs. I also serve as the Director – Carrier Relations for Intrado Inc.'s telecommunications affiliate, Intrado Communications Inc., which is the parent company of Intrado Communications of Virginia Inc. ("Intrado Comm"). My business address is 1602 Dry Creek Drive, Longmont, CO, 80503. I have been employed by Intrado Inc. and its affiliates since 2004. I am responsible for Intrado Comm's carrier relations with incumbent local exchange carriers ("ILECs"), such as Central Telephone Company of Virginia and United Telephone - Southeast, Inc. (collectively, "Embarq"), competitive local exchange carriers, wireless providers, and Voice over Internet Protocol providers.

2. I have knowledge of the facts set forth herein and I make this affidavit in support of Intrado Comm's Petition to the Federal Communications Commission to preempt the jurisdiction of the Virginia State Corporation Commission ("VSCC") with respect to the arbitration of an interconnection agreement between Intrado Comm and Embarq for the Commonwealth of Virginia.

3. Intrado Comm has authority to operate as a competitive local exchange carrier in the Commonwealth of Virginia and holds Certificate of Public Convenience and Necessity No. T-578.

4. Embarq is an incumbent local exchange carrier providing local telephone services in the Commonwealth of Virginia pursuant to authority granted by the VSCC.

5. In May 2007, Intrado Comm requested negotiation of an interconnection agreement with Embarq pursuant to Intrado Comm's rights under Section 251 of the Communications Act of 1934, as amended ("Act").

6. For purposes of the statutory deadlines, there is agreement among the Parties that interconnection negotiations commenced on June 22, 2007, resulting in the state commission arbitration window opening on November 3, 2007 and closing on November 28, 2007.

7. In response to Intrado Comm's negotiation request, Embarq proposed using its template interconnection agreement as the starting point for the Parties' negotiations.

8. After an initial meet-and-greet conference call, Intrado Comm provided Embarq with an initial mark-up of the template agreement in September 2007 and additional revisions in October 2007.

9. In early November 2007, Intrado Comm received correspondence from Embarq setting forth Embarq's position that portions of Intrado Comm's interconnection request may be governed by Section 251(a) of the Act, but Intrado Comm's interconnection request did not fall under Section 251(c)(2).

10. Shortly thereafter, the Parties held a conference call during which Embarq restated its position that it does not believe Intrado Comm is entitled to Section 251(c) interconnection because the services provided by Intrado Comm are not telephone exchange or

exchange access services. Embarq also indicated that Intrado Comm is not entitled to 251(c) interconnection because Intrado does not serve retail end users.

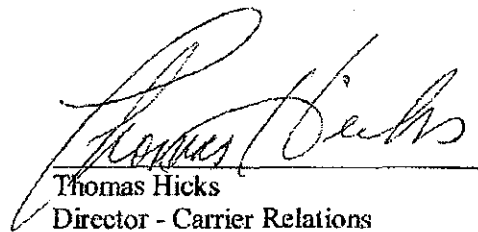
11. On November 27, 2007, Intrado Comm filed a Petition for Arbitration with the VSCC. Intrado Comm's Petition for Arbitration designated as an issue for arbitration whether Intrado Comm is entitled to Section 251(c) interconnection and Section 252 arbitration. Intrado Comm also designated several substantive issues raised by Embarq's template interconnection agreement, which Intrado Comm further revised before filing its arbitration petition. Intrado Comm also filed for arbitration against Embarq entities in Ohio and Florida.

12. On December 21, 2007, Embarq filed its Response to Intrado Comm's Petition for Arbitration as well as a Motion to Dismiss Intrado Comm's Petition for Arbitration. Intrado Comm filed an Opposition to Embarq's Motion to Dismiss on January 14, 2008, and Embarq filed a reply on January 23, 2008.

13. On February 14, 2008, the VSCC issued a decision deferring the issue of whether Intrado Comm is entitled to Section 251(c) interconnection (as well as all other issues designated for arbitration by Intrado Comm) to the Federal Communications Commission. A copy of the VSCC's Order is attached to the Petition as Attachment 2.

14. The Parties have continued their negotiations pursuant to a ruling in connection with the Ohio arbitration proceeding between the Parties. It is unclear whether Embarq views those negotiations (and the resulting resolved issues) as applicable to the Parties' Virginia interconnection agreement.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Thomas Hicks
Director - Carrier Relations

Attachment 2

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, FEBRUARY 14, 2008

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PETITION OF

INTRADO COMMUNICATIONS OF VIRGINIA, INC.

CASE NO. PUC-2007-00112

For Arbitration to Establish an Interconnection
Agreement with Central Telephone Company of
Virginia d/b/a Embarq and United Telephone -
Southeast, Inc. d/b/a Embarq, under Section 252(b)
of the Telecommunications Act of 1996

ORDER OF DISMISSAL

On November 27, 2007, Intrado Communications of Virginia, Inc. ("Intrado"), filed a Petition for Arbitration ("Petition") with the State Corporation Commission ("Commission") pursuant to 47 U.S.C. § 252(b)(1) ("Telecommunications Act"),¹ asking the Commission to resolve the disputes arising from Intrado's attempts to negotiate an interconnection agreement ("ICA") with Central Telephone Company of Virginia d/b/a Embarq and United Telephone - Southeast, Inc. d/b/a Embarq (collectively "Embarq").

In its Petition, Intrado requests that the Commission arbitrate the disputed issues identified in the attachments to its Petition, adopt Intrado's proposed contract language on those issues and order the parties to sign an ICA reflecting Intrado's proposed language and the parties' agreed-upon language.

On December 26, 2007, Embarq filed its response to Intrado's Petition ("Response"). Embarq's Response addressed 34 issues, but also noted a crucial threshold matter of whether Intrado had included interconnection issues that are not within the scope of § 251(c) of the Telecommunications Act.

¹ 47 U.S.C. § 151 *et seq.*

In a separate Motion to Dismiss, filed on December 27, 2007, Embarq argues that Intrado has failed to negotiate in good faith, that Intrado's Petition is procedurally deficient, and that Intrado has included issues that are not subject to arbitration. On January 14, 2008, Intrado filed its Opposition to Motion to Dismiss and Motion for Oral Argument, asserting that it had negotiated and sought arbitration in good faith, that its Petition meets the procedural requirements of § 252(b), and that the items included within its proposed ICA are within the purview of § 251(c).

Embarq filed its Reply on January 24, 2008. Embarq attached copies of motions to dismiss or to hold in abeyance filed by various AT&T operating companies in Ohio, Florida, and North Carolina. Embarq reiterated its allegations that Intrado sought to arbitrate issues that it had not sought to negotiate and noted that Intrado had apparently sought arbitration prematurely in Ohio, Florida, and North Carolina.

NOW THE COMMISSION, upon consideration of the pleadings and the applicable statutes and rules, finds that the Petition should be dismissed.

Section 56-265.4:4 B 4 of the Code of Virginia provides that the Commission shall discharge the responsibilities of state commissions pursuant to the Telecommunications Act and applicable law and regulations, including, but not limited to, the arbitration of interconnection agreements. However, the statute goes on to provide that the Commission may exercise its discretion to defer selected issues. In this case, we find there is a threshold issue that should be determined by the Federal Communications Commission ("FCC"). Therefore, we believe the FCC is the more appropriate agency to determine whether Intrado is entitled to interconnection pursuant to § 251(c) of the Telecommunications Act.² As a result, based upon the potential

² We note that until such time as this threshold issue is resolved that it would be inappropriate to resolve the other disputed issues. Therefore, we will defer resolution of all issues in Intrado's Petition to the FCC.

conflict that may arise should the Commission attempt to determine the rights and responsibilities of the parties under state law or through application of the federal standards embodied in the Telecommunications Act, we find that this arbitration proceeding should be deferred to the FCC.

Accordingly, IT IS ORDERED THAT the Petition is hereby dismissed. There being nothing further to come before the Commission, the papers shall be transferred to the files for ended causes.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:
Rebecca R. Geller, Esquire, Mintz Levin, 701 Pennsylvania Avenue, N.W., Washington, D.C. 20004; Rebecca Ballesteros, Associate Counsel, Intrado Communications, Inc., 1601 Dry Creek Drive, Longmont, Colorado 80503; Edward Phillips, Esquire, Mailstop: NCWKFR0313, 14111 Capital Boulevard, Wake Forest, North Carolina 27587-5900; William Watkins, United Telephone - Southeast, Inc., 5656 West 110th Street, Mailstop: KSOPKJ0401, Overland Park, Kansas 66211; and the Commission's Office of General Counsel and Division of Communications.